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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Telecommunications Services)
Inside Wiring)

CS Docket No. 95-184

Customer Premises Equipment)

In the Matter of)

Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992:)

MM Docket No. 92-260

Cable Home Wiring)

**JOINT SURREPLY COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE**

The Joint Commenters, through their attorneys, submit these Surreply Comments in response to issues raised by various parties in reply comments submitted pursuant to the Commission's Report and Order and Second Further Notice of Proposed Rulemaking in CS Docket No. 95-184 and MM Docket 92-260.

Once again, the Joint Commenters emphasize that we are not choosing sides in the continuing battle between the cable and SMATV industries. We are concerned only with ensuring that building owners are permitted to provide their residents with the services they

require. Given the complexity of the marketplace, the Commission would do best to avoid further regulation in this area.

To assist the Commission in understanding more fully the relationships among video programming providers, building owners, and building residents, the Joint Commenters offer the attached Declaration of Lyn C. Lansdale. Ms. Lansdale is Director of Resident Services of Avalon Properties, Inc., a multi-family residential real estate investment trust with operations in the Northeast, mid-Atlantic and Midwest. The Lansdale Declaration illustrates the complexity of the Commission's task.

The Lansdale Declaration also illustrates the flaws in arguments put forth by a number of parties. For example, it is not true, as stated in the Reply Comments of Adelphia Communications Corp., et al., that mandatory access statutes create more choices for residents. Adelphia Comments at 3. The evidence from the field is exactly the opposite. Lansdale Decl. at ¶¶ 11-13.

Time Warner states that the Commission's conclusion that building owners are more likely than cable operators to protect the interests of building residents is "naive." Time Warner Reply Comments at 2. Even the most basic discussion of the relationships among programming providers, building owners, and residents demonstrates that Time Warner is wrong. Property owners are in the business of pleasing tenants, and they know both what their tenants want and what they will not tolerate. Lansdale Decl. at ¶¶ 3, 6-8.

Ameritech states that our concern that without exclusive contracts some buildings might not have any kind of service is "vacuous" because franchised operators are required to build out their entire franchise areas. Ameritech Reply Comments at 7. This is incorrect. Not all franchises clearly require providers to serve any person that requests service. Furthermore, in the

past some cable operators have refused to serve buildings, usually because the revenues generated might not warrant the expense of wiring them. The Lansdale Declaration includes one example in which Avalon Properties was faced with a short-term problem, Lansdale Decl. at ¶ 13, but there have been other instances in which cable operators have simply refused to provide service, even in the face of complaints from the franchising authority. This is particularly likely to be a problem in smaller buildings in low income areas and locations outside large metropolitan areas, where low density or low penetration rates make some buildings unprofitable.

In addition, we take issue with Media Access Project's unfounded accusation that building owners have little interest in meeting the video programming needs of low income residents. MAP Reply Comments at 3, n.2. MAP appears to have misread our comments, in which we stated that "the Commission should not think that low and middle income Americans are the primary target of *video service providers*." Joint Comments at 4, n. 3 (emphasis added). There is not an apartment owner in the country that would not like to have video programming available for its residents, regardless of their income level. Our point was and remains that the problem is one of the economics of the distribution of that programming, and has nothing to do with the economics of the real estate industry.

Finally, RCN argues that Section 207 of the Telecommunications Act of 1996 gives the Commission authority over contracts between building owners and programming providers. RCN Reply Comments at 7. Neither the text of Section 207 nor its legislative history can support this claim.

Conclusion

The Joint Commenters continue to believe the Commission should proceed only with extreme caution. Every property is unique and poses different economic, technological and practical problems, and no general rule will be able to achieve the Commission's stated goals.

Respectfully submitted,



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March 15, 1998

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)	
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**DECLARATION OF LYN C. LANSDALE
IN SUPPORT OF JOINT SURREPLY COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE**

I, Lyn C. Lansdale, declare as follows:

1. I submit this Declaration in support of the Joint Surreply Comments of the Building Owners and Managers Association, International; the Institute of Real Estate Management; the International Council of Shopping Centers; the National Apartment Association; the National Association of Real Estate Investment Trusts; the National

Multi Housing Council and the National Realty Committee. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. I am the Director of Resident Services of Avalon Properties, Inc., and have served in that capacity since September 1996. I am responsible for negotiations with providers of video programming and telecommunications services, as well as water submetering and other opportunities in the area of natural gas and electricity, negotiations with ATM providers, and a variety of other resident programs and initiatives.
3. Avalon is a multi-family real estate investment trust, which owns and operates 22,000 apartment units in the mid-Atlantic region, the Midwest, and the Northeast. Our properties are primarily Class A assets located in urban locations in major metropolitan markets. Most of our communities were built in the mid to late 1980's and early 1990's; we are continuing to construct new properties. Our average resident turnover is 60% per year, and our average rent approaches \$1000/month. Our residents have a great deal of choice in the market place regarding where they live, and they choose our buildings because of the lifestyle we offer.
4. Most of the video programming providers serving our existing properties are franchised cable operators. Our agreements with these companies generally date back to when owners had no choice and therefore no leverage with franchise providers; as a result, our contracts typically grant exclusive easements, in perpetuity, concurrent with franchise renewals. Some of our properties are served by SMATV operators. In all of our new construction, we contact both private and franchise providers before selecting a provider.
5. Because we are building in existing franchise areas, some franchised cable providers are willing to talk to us about re-negotiation of existing contracts in order to gain access to

our new buildings. If we were not building, however, we would have very few opportunities to provide any options to our residents. We are only able to renegotiate contracts with incumbent franchised cable providers in rare circumstances, usually because the provider acquired the system from another company and failed to obtain a copy of the contract to serve our building, an easement was recorded, or some similar record-keeping error was made:

6. In selecting a provider, we consider a number of factors. These include: channel line-up and program selection; the availability of other services and features, including direct broadcast satellite service, sports packages, video-on-demand, high speed Internet access, and the ability to offer bundled services; the cost of the service to our residents; the provider's reputation for service and customer responsiveness; the reliability of system; the provider's willingness to upgrade and stay current with new technologies.
7. Another factor we consider is the provider's willingness to pay us a share of its revenue, but this is never a major factor. For example, in a 300 apartment community, with 65% cable penetration, and an average monthly cable bill of \$ 35, an 8% revenue share creates a total of \$543/month for us. Such revenue is not worth the loss of one single resident paying \$1000 per month in rent to us. We cannot afford to lose one resident over poor cable service, poor product offering, or poor price.
8. Our residents live with us for 1 ½ years on average and pay an average rent of \$1000/month; therefore, the amount they pay for cable is a relatively minor concern for most of our residents. On the other hand, because of the high rents they are paying, our residents expect a great deal of service and attention from our staff. In addition, because our turnover rate is so high and our prospective residents have so many choices in where

they live, we want to offer the finest in reliable technology at an attractive price to attract new residents and differentiate ourselves from our competitors. For example, we frequently assist new residents by ensuring that cable service is activated at the time they move in, as a part of our effort to make their move to our community as convenient as possible. We may also pick up converters when they leave. We cannot afford to lose a single resident over poor cable service or product. For example, we recently completed a new community in the Washington metropolitan area comprising over 500 apartments. In selecting a provider for this community, we considered several alternatives, including both the franchised provider and private providers. We chose the franchised provider because we believed they offered the best package and pricing, service, and reliability for our residents, even though they were unwilling to share revenues with us.

9. We have found that exclusive contracts benefit owners, residents, and providers. Such contracts are sometimes the only way to introduce competition to a community because franchised operators often have little incentive to offer everything our residents demand. Private providers today generally have higher customer service standards, better pricing, better product, and must market harder than many existing franchised providers. Private providers frequently have more channels, more options, and better packages because of their alliances with DirectTV and similar companies. They can also tailor programming more specifically to the demographic profile of a particular property. Without private providers, there are no choices for the community – the only choice becomes the franchised provider, and with no competition threatening the franchised provider, it is less likely to upgrade its system, offer new programming packages, or provide good customer service.

10. We do not require exclusive contracts; it is the providers that request it. While the idea of multiple providers sounds great, reality is different. Exclusivity is the only way the private providers can afford to compete with the franchise providers; without it they cannot justify the capital investment needed to serve a property. The providers need to be assured of a high enough penetration rate to meet earnings expectations, and the presence of an additional provider generally reduces earnings below acceptable levels.
11. Mandatory access statutes do not aid competition. We have fewer choices in states with mandatory access, and generally hear more complaints from residents about the quality of the programming and service provided by franchised cable operators in mandatory access states. Only one private provider that I am aware of that is willing to compete with a franchised operator in a mandatory access state, and then only if it is a luxury property, with more than 250 or 300 apartments, and located in one of a few specific areas, where it is clustered with other buildings served by that provider. For example, one of our newly-built communities in New Jersey has two providers: the private SMATV operator, and the local franchised provider. The private operator installed its wiring during construction after negotiating a contract with us; the franchised provider came in later under its mandatory access rights. Under our contract with the private provider, we receive a share of revenue in exchange for providing the exclusive marketing support of the on-site staff. The private provider has a better quality product, near video-on-demand, and better pricing to the resident. The franchised provider only has a small base of customers, but the private provider has actually had to raise its prices to its customers at that location in order to recoup its capital investment. Fortunately, the private provider's prices are still below the franchised provider's. In other locations, however,

the threat of such a cut in revenues is enough to keep the private provider from ever coming in. This is a highly unusual circumstance, that only exists because of the unique characteristics of the property and the contract we were able to negotiate with the private provider. If this had been an existing community with a franchised operator in place, we would probably not have gotten the private provider to come in and residents would have no choice.

12. My understanding is that in most instances in mandatory access states, if there is a choice of providers, it is because the owner installed a private system before the cable franchise provider pushed on to the property. Once the franchised provider is in place, it is practically impossible to convince a private provider to compete.
13. Franchised operators are also less likely to cooperate with us in mandatory access states. An example is a small community we built in New York, with under 200 apartments. We were unable to attract a private provider because of mandatory access and the inability to get an exclusive contract. The franchised provider was in process of upgrading its system, but unwilling to extend service to our community, except on its own terms. The provider claimed that it did not want to install a 450 Mhz system and then a few months later upgrade to a 750 Mhz system. As result, the company refused to come on site and provide service when we had residents moving in. They demanded a perpetual easement and no changes to their standard form contract language in return for providing service. The operator refused to cooperate until we asked the State Public Utilities Commission to intervene.
14. Providers need a contract long enough in length to guarantee a return on their capital investment. If we share in that capital investment, the term can be shorter. We are

hesitant to put in our own systems or to take responsibility for the maintenance and upkeep, however, because the technology is changing too fast and it is not our expertise. We are attempting to promote competition by requiring providers to turn their wiring over to us at the end of the contract term or negotiating for the right to buy the wiring at the end of the term. We prefer the shortest contract term possible so that we can force a bad operator out and encourage good service throughout the term. We generally try to negotiate five to seven year terms. On the other hand, some of our old agreements with franchised operators are for 15 years, with automatic renewals for as long as the local franchise is renewed. Even some of our older contracts with private operators present problems. For example, we recently purchased a small community outside a major metropolitan area with a private system in place. We inherited a poor system with poor contract terms (e.g., no service requirements). The company is willing to upgrade to a better system in return for five additional years on their contract. The only other option is to keep current contract in place for another two years, risk continued dissatisfaction from residents and deteriorating service, and examine other options when the contract expires in 2000.

15. We believe the best scenario for us and for residents would be a ban on perpetual contracts; no mandatory access; the ability (but not a requirement) to negotiate exclusive contracts; publicized guidelines or recommendations about service requirements, technology updates, disposition/ownership of wiring, and other important clauses to go in contracts with both franchised providers and private operators; and allowing property owners to determine options for their apartment communities based on superior product and pricing for their residents.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on March 16, 1998, at

2:55 pm

Lyn C. Lansdale
Lyn C. Lansdale

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